

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM KENNETH THOMPSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I. JURISDICTIONAL STATEMENT	1
II. STATEMENT OF THE CASE	2
III. ERROR SPECIFIED	3
IV. STATEMENT OF THE FACTS	3
V. ARGUMENT	6
A. NO SEARCH WARRANT WAS REQUIRED FOR THE SEARCH OF APPELLANT.	6
B. THE SEARCH OF APPELLANT DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT	13
C. THE TRIAL COURT'S RULING UPON APPELLANT'S OBJECTION TO ONE QUESTION DID NOT CONSTI- TUTE REVERSIBLE ERROR	13
D. THE SENTENCING OF APPELLANT DID NOT VIOLATE THE UNITED STATES CONSTITUTION	14
VI. CONCLUSION	15
CERTIFICATE	16

TABLE OF AUTHORITIES

<u>(Cases)</u>	<u>Page</u>
Blackford v. United States, 247 F.2d 745 (9th Cir. 1957)	6, 12, 13
Denton v. United States, 310 F.2d 129 (9th Cir. 1962)	6, 13
Goodman v. United States, 369 F.2d 166, 169 (9th Cir. 1966)	9
Huquez v. United States, No. 21518	6 n.4
Morgan v. United States, 340 F.2d 125 (9th Cir. 1965)	6
Murgia v. United States, 285 F.2d 14 (9th Cir. 1960)	6, 13
Rivas v. United States, 368 F.2d 703 (9th Cir. 1966)	6, 8, 9, 12
Spears v. United States, 370 F.2d 335 (9th Cir. 1967)	6
United States v. Di Re, 332 U. S. 581, 585 (1948)	15

Statutes

Title 18, United States Code, Section 3231	1
Section 1407	2, 11
Title 21, United States Code, Section 173	2
Section 174	1
Title 28, United States Code, Sections 1291 and 1294	1

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I,

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a three count indictment, following a non-jury trial [C.T. 2-4, 19]^{1/}.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

^{1/}

"C. T." refers to the Clerk's Transcript of Record.

STATEMENT OF THE CASE

Appellant was charged in two counts of a three-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant Thompson, William Savidan, and Gerald Van Hook knowingly imported and brought approximately seven grams of heroin, a narcotic drug, into the United States from Mexico, contrary to 21 U.S.C. 173 [C.T. 2].

The second count alleged that appellant, Savidan and Van Hook knowingly concealed, and facilitated the transportation and concealment of, approximately seven grams of heroin, which, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T. 3].

The third count charged defendant Savidan with violation of 18 U. S. C. 4107 [C.T. 4].

Appellant waived the right to trial by jury. His court trial commenced on September 21, 1967, before United States District Judge Raymond E. Plummer [C.T. 19; R.T. 3].^{2/}

Appellant's motion to suppress evidence was denied on September 22, 1967, and appellant was found guilty as charged in the first two counts on the same date [R.T. 93, 99].

On November 3, 1967, appellant was sentenced by United States District Judge James M. Carter to the custody of the Attorney General for

2/

"R.T." refers to the Reporter's Transcript,

five years upon each count, to run concurrently. It was recommended that he receive treatment as a narcotics addict. It also was recommended that if appellant was in state custody during the period of confinement, that a state institution be designated as the place of confinement for service of the Federal sentence [C.T. 23].

Thereafter, appellant filed a timely notice of appeal [C.T. 26].

III.

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged unlawful search and seizure.
2. Alleged violation of due process of law in regard to the search of appellant.
3. Alleged error in receiving evidence concerning appellant's activities and intentions,
4. Alleged unconstitutionality of 18 U. S. C. 4251.

IV.

STATEMENT OF THE FACTS

Appellant was a passenger in an automobile which entered the United States from Mexico at San Ysidro, California, at approximately 8:40 p.m. on May 21, 1967, a Sunday [R.T. 5, 17]. Two other persons were in the vehicle [R.T. 6].

A United States Customs inspector talked to the occupants of the vehicle. They declared no merchandise. The inspector noted that they were nervous and that their eyes were pinpointed, so he took them to the

secondary area for a personal search [R.T. 6-7]. Appellant had been convicted of the felony of possession of heroin and was required to register when he crossed the border, but he did not register [R.T. 38-39, 50-51].

The three individuals were personally searched in the secondary area. Appellant had prominent needle marks. The other two also had needle marks on the arms [R.T. 7]. Appellant's clothes were completely removed during the personal search. No contraband was found.^{3/} The vehicle was searched, and no contraband was found in the vehicle [R.T. 8, 12].

The inspector was suspicious that appellant might be a narcotics violator, due to needle marks on his arm, the pinpointed appearance of his eyes, and the fact that he appeared to be under the influence [R.T. 12]. The inspector thought that appellant had narcotics concealed in the body cavity [R.T. 15].

Customs Port Investigator Arthur E. Hanson was called to the port of entry. He testified that he believed that the inspector told him that all three individuals had needle marks and appeared to be under the influence of a narcotic [R.T. 28-31]. Hanson also was told that the suspects were nervous. He observed needle marks on the arms of all of the suspects [R.T. 35].

3/

The Reporter's Transcript actually states that contraband was found during this search in the secondary area [R.T. 12]. Counsel for both parties agreed to stipulate that this is an error.

Appellant was arrested for failure to register shortly after Investigator Hanson arrived at the scene [R.T. 29-30].

Customs officers transported the suspects to the office of Dr. Paul R. Salerno, approximately 16 or 17 miles from the international border [R.T. 16, 20-21, 31]. Dr. Salerno was a physician engaged in the practice of medicine. The officers and suspects arrived at the office at approximately 10:30 p.m. on May 21 [R.T. 16-17].

Dr. Salerno examined all three suspects. He noticed old scarring on appellant's left arm, as well as eight vein puncture marks which appeared to have been made during the past several days [R. T. 17, 21]. He located the contraband in question by examining appellant's rectal area with a lubricated gloved finger. The exhibit was gently extricated from the rectal tract. No bleeding occurred [R. T. 19, 28].

There was no arrest warrant and no search warrant [R. T. 11, 30].

Dr. Salerno testified that a suppository might cause a bowel movement but that suppositories "are not a very reliable method of removing a large foreign object." [R.T. 25].

It was stipulated that a chemist would testify that the exhibit in question contained heroin [R.T. 87].



ARGUMENT

A. NO SEARCH WARRANT WAS REQUIRED FOR THE SEARCH
OF APPELLANT.

This case involves a rectal border search. This Court has repeatedly upheld searches of this nature, conducted without a search warrant,

Blackford v. United States, 247 F.2d 745 (9th Cir. 1957);

Murgia v. United States, 285 F.2d 14 (9th Cir. 1960);

Denton v. United States, 310 F.2d 129 (9th Cir. 1962);

Morgan v. United States, 340 F.2d 125 (9th Cir. 1965);

Rivas v. United States, 368 F.2d 703 (9th Cir. 1966);

Spears v. United States, 370 F.2d 335 (9th Cir. 1967).^{4/}

Appellant argues that a search warrant should have been obtained, although the incident occurred on a Sunday [R.T. 17]. In Rivas, supra, this Court held that a search warrant need not be obtained for a rectal border search where there is a clear indication that the suspect may be smuggling contraband. A "clear indication" was defined as a "plain suggestion," something less than probable cause and more than mere suspicion,

Rivas, supra, at p. 710.

In the Rivas opinion, written by Judge Barnes, the Court stated:

"We believe a previously convicted and registered

^{4/}

At the time of the writing of this brief, another rectal search case is awaiting decision in this Court, Huguez v. United States, No. 21518.



users of narcotics (18 U. S. C. § 1407) , coming across the border under the influence of narcotics , as readily shown by his eyes , disclosing thirty 'recent' needle marks on one arm , and 'recent' needle marks on the other , who acts 'in an extremely nervous manner ,' may be searched , as one reasonably portraying a 'clear indication' he may be smuggling contraband." (at p. 710).

Considering the facts of the instant case , it would be difficult to find a factual situation closer to Rivas than the facts herein . Appellant also was a previously convicted violator , having been convicted of possession of heroin , a narcotics felony [R.T. 50-51] . The agents were aware of this fact before the search at Dr. Salerno's office , as appellant was arrested for failure to register shortly after Investigator Hanson arrived at the port of entry [R.T. 29-30] . The inspector believed that appellant was under the influence [R.T. 12]. ^{5/} Hanson testified that he

5/

Appellant emphasizes the inspector's statement that he was no more suspicious than "normally" of appellant . This appears to be an exercise in ambiguities , because the inspector also testified:

"Well , no more reason because I kind of thought he had it all the time." [R.T. 15].

Thus "normally" apparently refers to the "normal" situation with nervous narcotics users who appear to be under the influence .

believed that the inspector told him that the suspects appeared to be under the influence of a narcotic [R.T. 31]. Appellant had recent needle marks and was nervous. His eyes were pinpointed, and the pupils were smaller than normal [R.T. 7, 17].

In an attempt to meet the heavy burden of distinguishing Rivas from the instant case, appellant states that the condition of Rivas (under the influence) was "readily shown," and that Rivas was "extremely nervous," while appellant was described as being "nervous."

(Appellant's Opening Brief, p. 23. We omit appellant's reference to testimony stricken from the record).

While it is correct that Dr. Salerno was unable to determine whether appellant was under the influence, the critical question in a claim of violation of the Fourth Amendment involves the state of mind of the officer who directed or conducted the search. The inspector noted appellant's needle marks and the pinpointing of his eyes and concluded that appellant appeared to be under the influence [R.T. 12]. The trial Court held, as a finding of fact, that the inspector "believed that narcotics were concealed on the bodies of the three persons" [R.T. 90]. The officer should not be held to the educational standards of a physician. If such was the case, no state officer could safely make an arrest for the offense of being under the influence of narcotics, as an expert physician might overrule his good faith belief.

In regard to the distinction between nervousness and extreme

nervousness, this is hardly a likely place to draw the line between the lawful search and the unlawful search. During the hearing in the trial Court, appellant's counsel referred to the nervousness of the suspects in the case and stated:

"I don't think it indicates anything at all." [R.T. 75].

Appellant also attempts to distinguish Rivas because Rivas was not subject to arrest and could leave the scene and dispose of the contraband, whereas appellant was arrested for failure to register. However, appellant overlooks the fact that he had a right to a speedy arraignment and a right to immediate bail.

Appellant contends that the agents had "ample time" to obtain a search warrant in two hours and five minutes on a Sunday night. [Appellant's Opening Brief, pp. 16-17]. There is no support in the record for this extraordinary assertion.

The findings of fact by the trial Judge are highly significant, as he had an opportunity to observe the demeanor of the witnesses. The general rule provides that findings of fact by the trial Judge will not be set aside unless "clearly erroneous." This rule has been applied to Fourth Amendment questions.

Goodman v. United States, 369 F.2d 166, 169 (9th Cir. 1966).

Judge Plummer, the trial Judge, announced various findings of fact, including the following:

(a) "All three of the persons appeared to Inspector Orear to be

nervous. Their eyes were pinpointed." [R.T. 89].

- (b) "Thereafter Inspector Orear examined the arms of all three persons and all had fresh needle marks. The defendant had fresh needle marks on his left arm." [R.T. 89-90].
- (c) "Inspector Orear believed that narcotics were concealed on the bodies of the three persons and contacted Customs Agents Hanson and Burnett." [R.T. 90, emphasis added].
- (d) "Upon examination a spherical foreign object was palpitated and gently extracted." [R.T. 91, emphasis added].
- (e) "The examination conducted by Dr. Salerno was not painful Nor does the court believe defendant's testimony that the examination made by Dr. Salerno injured the defendant physically in any manner."
- (f) "The search made in this case was a border search and no search warrant was necessary. Humane procedures were followed and it was made in a manner that did not offend ones sense of decency. The intrusion made during the course of the search was justified by the circumstances and was not conducted in an improper manner. The search was not predicated upon mere chance upon mere suspicion on the part of the Customs officials." [R.T. 91, emphasis added].
- (g) "Before the rectal examination was conducted by Dr. Salerno

the Customs Agents were in possession of the following information:

"First

"Second

"Third

"Fourth, that defendant was a prior violator who knew he was supposed to register and who had not done so;

"Fifth, that Inspector Orear after carefully searching defendant's person, his clothing, and the car in which he had been a passenger, had not located any contraband and believed that it was concealed in some body cavity of the defendant."

[R.T. 92].

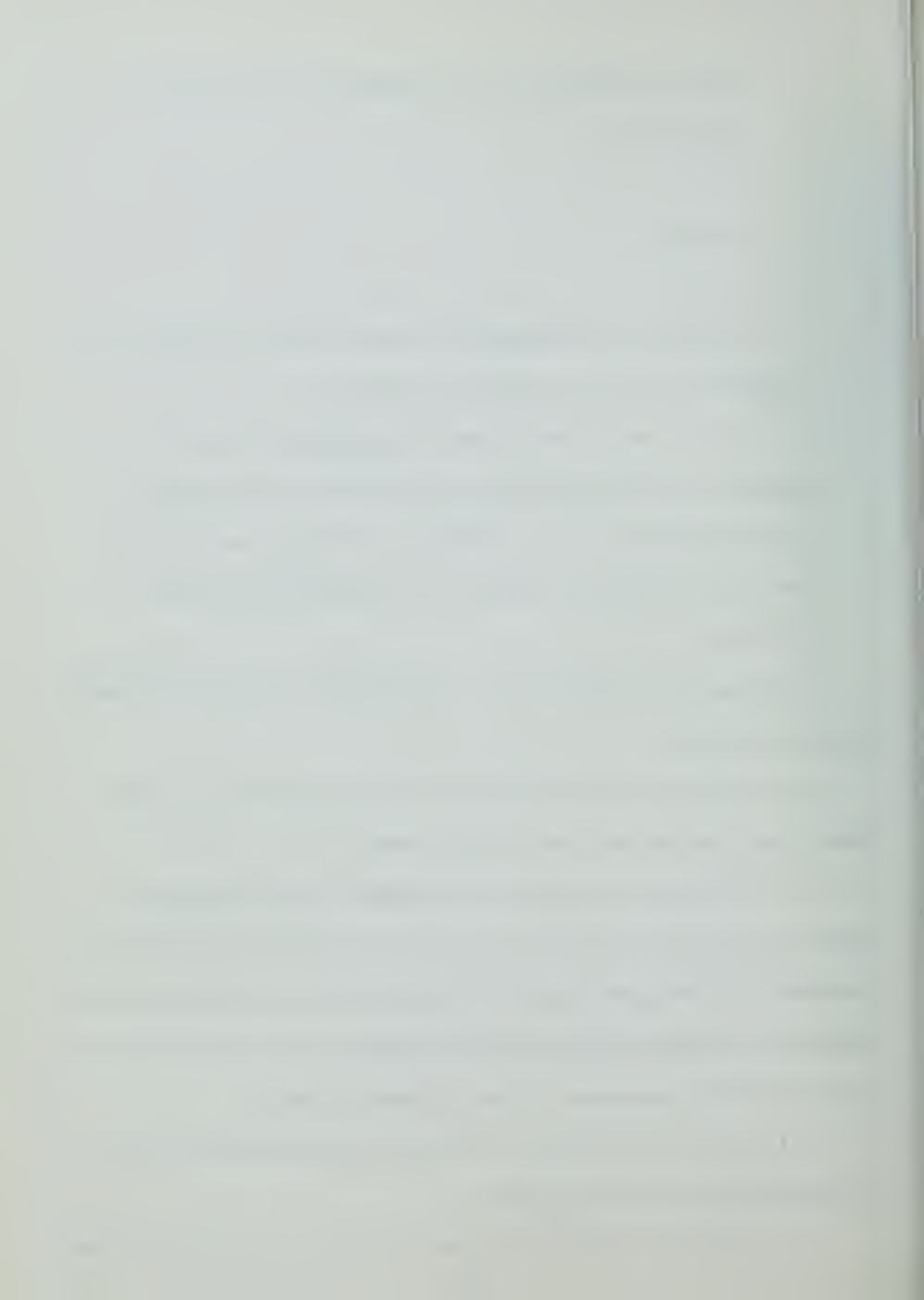
Based upon the findings of fact, the trial Judge reached the following conclusions of law:

"(1) The arrest of the defendant for violation of Title 18, United States Code, Section 1407, was a lawful arrest.

"(2) The facts and circumstances known to the customs agents clearly indicated and plainly suggested that the defendant had contraband concealed in a body cavity, and that a search would reveal the contraband. The search conducted by Dr. Salerno was humane, legal, reasonable and did not shock the conscience or offend a sense of justice.

"(3) The search made was a continuing border search with respect to time and distance from the border.

"(4) The United States Government has an absolute right to a border



search. No probable cause is necessary. All that is required is that there be a clear indication that in fact contraband will be found." [R.T. 92-93].

Appellant argues that the agents should have employed a different technique:

"All the agents had to do to assure recovery of the evidence without violating defendant's constitutional rights was to lock the legally arrested defendant in a cell, furnish him with a dry, clean bucket, give him a suppository or not, as they chose, and let nature take its course."

[Appellant's Opening Brief, p. 17].

This Court has rejected this proposition:

"If the officers simply jailed Blackford, his attorney would have sought his release by way of a writ of habeas corpus. If the writ be granted, Blackford would walk out with the heroin."

Blackford, supra, at p. 753.

Dr. Salerno testified that use of suppositories is "not a very reliable method" and that the foreign object might not be removed by a suppository [R.T. 25].

It should be noted that the primary distinction, slight though it may be, between Rivas and the instant case, is the fact that Rivas registered and appellant criminally failed to do so. The evasion of the registration law is more suspicious than the act of registering, as the registrant would tend to case attention upon himself.

B. THE SEARCH OF APPELLANT DID NOT VIOLATE THE DUE
PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Appellant contends that the search of his rectum was shocking to the conscience and violated due process of law. The law is to the contrary.

Blackford, supra, 247 F.2d 745, 753;

Murgia, supra, 285 F.2d 14, 16;

Denton, supra, 310 F.2d 129, 133;

Rivas, supra, 368 F.2d 703, 708, 711.

C. THE TRIAL COURT'S RULING UPON APPELLANT'S OBJECTION
TO ONE QUESTION DID NOT CONSTITUTE REVERSIBLE
ERROR.

When appellant testified in regard to the motion to suppress evidence, the trial Judge asked him to state how the contraband went into his rectum and how he intended to remove it. There was an objection to the first of these questions but not to the second. The objection was overruled [R.T. 61-62]. Appellant contends that the ruling upon the objection constituted error because the questions were immaterial.

The questions were not immaterial, because they related to the issue of the reasonableness of the process of removal of the contraband by the physician. Appellant objected to Dr. Salerno's procedures. If there are superior methods for entering and removing contraband from the rectum, it was important for the trial Court to question appellant concerning alternative

methods, in order to determine the reasonableness of Dr. Salerno's procedures.

Assuming, arguendo, that the ruling upon the objection constituted error, it was harmless error. Appellant's statement that he put the contraband in his rectum was no surprise. Had the question not been asked, the natural assumption would be that the appellant placed the narcotics in his own rectum. The alternative guess would be that someone else placed it there. This possibility would not affect the Court's ruling upon the motion.

D. THE SENTENCING OF APPELLANT DID NOT VIOLATE THE
UNITED STATES CONSTITUTION.

Appellant contends that his sentencing procedure violated due process of law and equal protection of the laws. He maintains that it is unconstitutional to permit narcotics addiction treatment under 18 United States Code 4251 and the following sections, for persons otherwise eligible who do not have two felony convictions, while denying such treatment to those who have two felony convictions.

It would appear that appellant is not demanding the lighter mandatory "sentence" (six months after commitment) under 18 United State Code 4254, as Congress unquestionably has the power to provide for heavier sentences for recidivists. Consequently, appellant's contention will be discussed upon the assumption that he is referring to the right to narcotics addiction treatment only.



This is not a violation of equal protection. It applies equally to all offenders with two felony convictions.

Furthermore, appellant has not shown that he is ineligible for narcotics addiction treatment under other provisions of law. It is widely recognized that narcotics addiction is primarily a psychiatric problem. Appellant has not shown that he has been denied psychiatric assistance. On the record before this Court, it is certainly questionable that appellant has overcome "the strong presumption of constitutionality due to an Act of Congress. . . ."

United States v. Di Re, 332 U.S. 581, 585 (1948).

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney

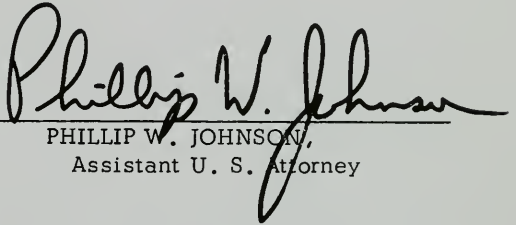
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Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in black ink, reading "Phillip W. Johnson", is written over a horizontal line. The signature is fluid and cursive, with the first name "Phillip" being the most prominent part.

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

